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9                          IN THE UNITED STATES DISTRICT COURT  
10                          FOR THE DISTRICT OF OREGON  
11                          PORTLAND DIVISION

12 JOSEPH R. MADURA,                          )  
13                          Plaintiff,                          )  
14                          v.    )                          No. CV-09-1439-HU  
15 MICHAEL J. ASTRUE,                          )  
16 Commissioner of Social                          )                          FINDINGS & RECOMMENDATION  
17 Security,    )  
18                          Defendant.                          )  
19                          )  
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35 1 - FINDINGS & RECOMMENDATION

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 4 701 5th Avenue, Suite 2900 M/S 901  
 5 Seattle, Washington 98204-7075

6 Attorneys for Defendant

7 HUBEL, Magistrate Judge:

8 Plaintiff Joseph R. Madura brings this action for judicial  
 9 review of the Commissioner's final decision to deny disability  
 10 insurance benefits (DIB) and supplemental security income (SSI).

11 Defendant moves to dismiss the action based on lack of  
 jurisdiction. I recommend that the motion be granted.

#### 12 STANDARDS

13 A motion to dismiss brought pursuant to Federal Rule of Civil  
 14 Procedure 12(b)(1) addresses the court's subject matter  
 15 jurisdiction. The party asserting jurisdiction bears the burden of  
 16 proving that the court has subject matter jurisdiction over his  
 17 claims. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375,  
 377 (1994).

18 A Rule 12(b)(1) motion may attack the substance of the  
 19 complaint's jurisdictional allegations even though the allegations  
 20 are formally sufficient. See Corrie v. Caterpillar, Inc., 503 F.3d  
 21 974, 979-80 (9th Cir. 2007) (court treats motion attacking  
 22 substance of complaint's jurisdictional allegations as a Rule  
 23 12(b)(1) motion); Dreier v. United States, 106 F.3d 844, 847 (9th  
 24 Cir. 1996) ("[U]nlike a Rule 12(b)(6) motion, a Rule 12(b)(1)  
 25 motion can attack the substance of a complaint's jurisdictional  
 26 allegations despite their formal sufficiency[.]") (internal  
 27 quotation omitted). Additionally, the court may consider evidence  
 28 outside the pleadings to resolve factual disputes. Robinson v.

United States, 586 F.3d 683, 685 (9th Cir. 2009); see also Dreier, 106 F.3d at 847 (a challenge to the court's subject matter jurisdiction under Rule 12(b)(1) may rely on affidavits or any other evidence properly before the court).

## DISCUSSION

The Social Security Act (SSA) allows for judicial review of "any final decision of the Commissioner" if a civil action in federal district court is "commenced within sixty days after [] mailing . . . notice of such decision or within such further time as the Commissioner of Social Security may allow." 42 U.S.C. § 405(g).

Following a decision by an Administrative Law Judge (ALJ), and  
an appeal to the Appeals Council, SSA regulations provide that if  
the Appeals Council grants review of a claim, then the decision  
that the Council issues is the Commissioner's final decision. But  
if the Council denies the request for review, the ALJ's opinion  
becomes the final decision. See 20 C.F.R. §§ 404.900(a)(4)-(5),  
404.955, 404.981, 416.1400(a)(4)-(5), 416.1455, 416.1481,  
422.210(a).

Absent a reasonable showing to the contrary, the Commissioner presumes that a claimant receives notice of his final decision five days after the date of the Appeals Council's denial of review of the ALJ's decision. 20 C.F.R. § 422.210(c). Thus, to be timely, a civil action seeking judicial review of the final agency decision must be filed within sixty-five days of the date of the Appeals Council's decision. However, while a claimant is expected to seek judicial review within the specified time, the Commissioner will extend the allowable time period upon a showing of good cause. 20

1 C.F.R. §§ 404.911, 404.982, 416.1411, 416.1482.

2 In the instant case, an ALJ issued a written decision in  
3 plaintiff's case on April 15, 2009. Declaration of Joan Devera at  
4 ¶ (3)(a); Exh. 1 to Devera Declr. Plaintiff requested review of  
5 this decision. Id. On September 23, 2009, the Appeals Council  
6 sent notice of its action, denying plaintiff's request for review,  
7 to plaintiff and to his representative. Id.; Exh. 2 to Devera  
8 Declr. The notice included information pertaining to plaintiff's  
9 right to appeal to federal district court. Id.

10 Plaintiff's Complaint in this Court was filed on December 4,  
11 2009. December 4, 2009, is more than sixty-five days after  
12 September 23, 2009. Defendant is unaware of any request by  
13 plaintiff for an extension of time to file a civil action. Devera  
14 Declr. at ¶ (3)(b). Plaintiff's Complaint is untimely.  
15 Additionally, plaintiff offers no argument or evidence to support  
16 an equitable adjustment to the time period allowed by statute and  
17 regulation. In fact, plaintiff failed to respond to this motion.  
18 Thus, this case should be dismissed.

19 CONCLUSION

20 Defendant's motion to dismiss (#10) should be granted.

21 SCHEDULING ORDER

22 The Findings and Recommendation will be referred to a district  
23 judge. Objections, if any, are due June 14, 2010. If no  
24 objections are filed, then the Findings and Recommendation will go  
25 under advisement on that date.

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If objections are filed, then a response is due July 1, 2010.  
When the response is due or filed, whichever date is earlier, the  
Findings and Recommendation will go under advisement.

IT IS SO ORDERED.

Dated this 25th day of May, 2010.

/s/ Dennis James Hubel  
Dennis James Hubel  
United States Magistrate Judge